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Supreme Court of the United States

OCTOBER TERM, 1952

No. 687

JULIUS ROSENBERG and ETHEL ROSENBERG,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE BRIEF OF NATIONAL LAWYERS GUILD AS *AMICUS CURIAE*

NATIONAL LAWYERS GUILD AS *Amicus Curiae*,

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To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The National Lawyers Guild is a bar association of national membership. Among its aims is the promotion of justice in the administration of the law. In pursuance of this aim it has frequently intervened as *amicus curiae* whenever the opportunity presented itself to advance the promotion of justice by the furtherance of the proper administration of law.

It is for that reason that we respectfully seek leave of the Court to intervene as *amicus curiae* in this proceeding.

In our brief as *amicus curiae* we would argue a question of law not presented in all of its significant aspects by the

parties, or previously decided by this court, and which is relevant to the disposition of this case. We earnestly submit that the issue here discussed is of fundamental importance and far-reaching consequence for the true administration of justice.

Consent of the Solicitor General of the United States to the filing of our brief as *amicus curiae* has been requested but refused. Counsel for petitioners have indicated their readiness to consent.

Brief Statement of Argument to be Presented if Leave to File Brief is Granted

This petition affords the opportunity for consideration and determination of an original question of law of major importance to the true administration of justice in the courts. That question may be stated as follows: Is a new rule of law required to satisfy the Sixth Amendment requirement of due process in the light of the development and impact of the means of mass communication, the press, radio and television upon legal proceeding? In the words of Chief Judge Magruder in the *Delaney* case (199 F. 2nd 107, 113, 1 Cir.): "Perhaps the Supreme Court has not spoken its last word upon this vexing subject."

The Court of Appeals saw the issue before it in this case as merely a procedural one which, when tested by prevailing standards, failed to satisfy it that the appellant had been improperly convicted and sentenced. It discussed the question under the heading "Alleged Prejudicial Newspaper Publicity" and disposed of it almost cursorily with the conclusion (a) that it was "an afterthought" of counsel; (b) that it was less damaging than in the *Delaney* case; (c) that counsel failed to move for a continuance; and (d) that counsel didn't really believe the publicity was harmful. We are forced to the conclusion that for the Court of Appeals the question raised no fundamental issue and had

merely a specific application to the case at hand, not a general one to all cases which are the subject of intense discussion in the media of mass communication before and during the trial.

We believe otherwise. As we see it, this Court is confronted with a due process question going to the essentials of the constitutional guarantee of a fair trial. It is not a question of the subjective views of counsel (on either side), or of the parties to an action, or even of the adequacy of the court's efforts to give the parties, especially the defendants in a criminal case, fair play.

The real issue is whether it is possible to conduct a fair trial when the case is pre-tried and co-tried in the public arena through the medium of the press, radio, television and other forms of propaganda or publicity.

We cannot agree with the view expressed by the Court of Appeals that the *Delaney* opinion should be understood as turning upon the point of a timely motion by counsel for a continuance. The appellate judges in the First Circuit raised their eyes above the printed record, and looked beyond the courtroom scene and its participants, judges, lawyers, jury and defendant. They placed the case in its real setting; the city of Boston, and one of its leading politicians, the national Internal Revenue investigation, hundreds of stories, radio reports, television programs, millions of readers and listeners, were all essential parts of the picture. They thus came to see the true form and content of the fundamental issues raised by the *Delaney* trial. Was this due process? Was this a fair trial? Was this giving the defendant his day in court, as the Constitution commanded and fair play required?

The *Rosenberg* case presents the same question before this court only more grimly. Life not alone liberty is at stake. The defendants are not prominent, influential politicians, charged with an offense quite commonplace for politicians, and to which most people are indifferent be-

cause it appears to affect them only vaguely. The petitioners here were obscure individuals. They were accused of a crime which any of their adult fellow Americans might look upon as potentially dangerous to them personally. The *Delaney* publicity may have been more concentrated and closer to the trial, but the Court of Appeals in the *Rosenberg* case in calling it "more obviously damaging" than the *Rosenberg* publicity was for the moment, shutting its mind to reality.

The nature and extent of the publicity here made it imperatively necessary to adopt a standard so as to insure that our courts of law shall do exact justice under law, not echo the passing clamor.

We believe "the present case favors the opportunity to settle these matters as respects the administration of the Federal Criminal Law." *Sorells* v. *U. S.*, 287 U. S. 435, 454. In the *Sorrells* case this court was confronted with the problem of adopting a policy for cases where entrapment occurred and for which "no guide or rule" nor "principle of statutory consideration" existed. Said Mr. Justice Roberts in a separate opinion concurred in by Justices Brandeis and Stone: "the doctrine rests rather on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court." P. 457.

Without suggesting what standards should apply to all cases, for present purposes it is sufficient to recognize that requirements of due process are not fulfilled in any case where it appears as a fact that widespread propaganda concerning the specific subject matter of the case was carried on as a preface to or parallel with the legal proceedings. It is not enough for the Court, in such cases, to measure on judicial scales the weight of the propaganda and to conclude from case to case whether or not the defendant suffered therefrom. The same standard should be adopted as

the court has finally come to apply to cases involving denial of right of counsel, or the systematic exclusion of persons from juries for race and color. Today the due process principle is unchallenged that where there is any form of denial of the right of counsel, or where jury lists are discriminatory, the court will not sustain the judgment.

We believe that the rationale of the decisions in those cases is that it is the administration of justice, not alone the rights of the parties to a case which requires the setting aside of such judgments.

So also, where a trial takes place under circumstances such as those prevailing in the *Delaney* and *Rosenberg* cases, that trial is null and void, *ab initio*. It matters not what the judge's opinion may be concerning the merits of the case; nor the failure of counsel to raise the issue (nor even counsel's temporary belief that the propaganda was not seriously injurious to his client). The interest of a democratic society in the true administration of justice transcends the interests or desires of the participants.

The benefit or loss to the parties involved in the case is a secondary matter under these circumstances. A useful analogy is afforded by the action of the courts in declaring judgments to be void as a matter of public policy in divorce cases, despite the unfortunate consequences to one of the parties who might as a direct result of the court's decision have become the subject of a bigamous marriage or be deemed to have given birth out of wedlock.

Similarly this court has held that a confession obtained during an arraignment after a period of unlawful detention, may not be introduced in evidence whether or not such unlawful detention resulted in the confession. *McNabb* v. *U. S.*, 318 U. S. 332.

When surrounding conditions such as those prevailing here are brought to its attention, in whatever manner or at whatever time, the court should consider it to be its duty,

to characterize such a judgment as a nullity or in the case of the trial judge to refuse to proceed with the trial until the impact of such external influences has been dissipated.

We do not consider the opinion in the *Delaney* case as being limited to the facts of that case. It was, of course, correct to hold that if "the legislative committee deemed that an open hearing at that time was required by overriding considerations of public interest, then the committee was, of course, free to go ahead with its hearing, merely accepting the consequence that the trial of Delaney on the pending indictment might have to be delayed." But even if the King Committee had held its hearings in Washington rather than Boston and in executive rather than public session, if the propaganda produced through the media of mass communication constituted a pre-trial of the issues or a parallel trial, no fair trial could have taken place. So here, we consider the action of the prosecutor in injecting inflammatory matter into the public blood-stream, to be an aggravation of the evil but not the entire evil. The total evil was the sum of the atom bomb and atom spy publicity and propaganda from whatever source it emanated, which we denominate as pre-trial and parallel-trial of the *Rosenberg* case.

It is of little moment that a defendant expresses no dissatisfaction with his trial, though it be an unfair trial. If an armed mob surrounds a courthouse shrieking for conviction, the defendant's willingness nevertheless to proceed to trial does not absolve the court or satisfy the requirement of due process and fair trial. And the same is true if the situation be reversed, the prosecution being ready to proceed despite the mob's demand that the defendant be released. There is no power in a party or in counsel to waive a "fair trial." The public interest is at stake in every trial and that interest demands that every trial be a fair trial.

"But a trial in court is never, * * * purely a private controversy * * * of no importance to the public." The State,

whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence." *N. Y. Central R. R. Co.* v. *Johnson*, 279 U. S. 310, 318. See also *Pierce* v. *U. S.*, 86 F. 2, 949, 953.

It would be a strange paradox indeed were courts to apply this basic principle with unwavering regularity and sternness where a single improper act of limited scope takes place—for example, an appeal to prejudice by counsel, and reject it where the total trial from beginning to end is infected with prejudice. Yet that is the consequence of the decision of the Court of Appeals in this case. It condemned the single act of misconduct committed by the prosecution in issuing statements concerning a prospective witness, yet remained unaffected by the overwhelming record of hostile propaganda or publicity which inevitably infected every aspect of the case from the day the trial opened until the judgment.

CONCLUSION

At the present stage of their development the media of mass communication generate propaganda pressures in many and varied forms which tend especially, in certain types of cases, to impede the true administration of justice. The manifestations and effects of such pressures are most apparent in cases such as *Rosenberg* and *Delaney*—cases which raise important issues arousing wide public interest.

In all such cases, it is our belief that the interests of justice are better served if a trial is deferred until a calmer time. This is true whether or not the parties recognize the need for delay and take the technical step of moving for it. The assurance of equal justice and a fair trial for all accused persons is a fundamental responsibility of governments, and in the first place, of the courts. The circum-

stance that counsel may be unaware of the impact of propaganda pressures does not alter or fulfill this judicial responsibility. The determination of judges, juries and lawyers to stand impervious are not sufficient guarantee of true objectivity. When the careers, even the livelihood of individuals, may turn upon the outcome, the pressures may well find channels for operation even below the level of consciousness.

We respectfully submit that certiorari should be granted here if only for the purpose of considering whether in this case, and in all similar cases upon which the media of mass communication have operated intensively in the direction of creating a hostile atmosphere, the rule should or should not be adopted to treat the resulting judgment as a nullity, ordering a new trial at such time as the impact of massive hostile propaganda has been dissipated.

Respectfully submitted,

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